

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 98-761

December 2, 1998

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE, ET. AL.  
Request for Advisory Ruling  
Regarding Electric Utility  
Status of Wyman 4 Minority Owners

ADVISORY RULING

WELCH, Chairman, NUGENT and DIAMOND, Commissioners

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## **I. SUMMARY**

In this Advisory Ruling, the Commission concludes that in applying the definition of "excluded electric plant," each individual ownership interest in a Maine generating facility will be evaluated separately. If the interest qualifies as "excluded electric plant," ownership of that interest will not be subject to Commission regulation as an electric utility. If the interest fails to qualify as "excluded electric plant," the owner is subject to regulation as an electric utility.

## **II. REQUEST FOR RULING**

On September 29, 1998, several utilities ("the petitioning utilities")<sup>1</sup> filed with the Commission a petition for an advisory ruling. The petition noted that foreign utilities that were minority owners of generation plants located in Maine have historically been exempt from regulation as public utilities in Maine. Recent statutory amendments have cast doubt on the continued vitality of that historic exemption. The petition asked for a Commission determination of whether those foreign utilities may be subject to regulation in Maine.

Pursuant to Chapter 110, Part 6 of our rules, the utilities' petition for an advisory ruling was reviewed by the General Counsel, who recommended to the Commission that an advisory ruling be issued. On October 13, 1998, the Commission voted to issue an advisory ruling on the utilities' petition. As required under Section 603, notice of this proceeding was given to the

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<sup>1</sup>The petitioning utilities include Central Vermont Public Service Corporation, Fitchburg Gas & Electric Company, Green Mountain Power Corporation, Public Service Company of New Hampshire, Sithe Energies, Inc., Southern Energy, Inc. and the Village of Lyndonville.

petitioners and all Maine electric utilities. The Commission received no comments on the petition.

### III. DISCUSSION

Each of the petitioning electric utilities either owns a minority interest in the Wyman 4 generating facility in Yarmouth, Maine, or expects to become a minority owner pursuant to executed agreements to purchase the interest of a current minority owner of the facility. None of the petitioning utilities sell electricity to retail customers in Maine or plan to do so prior to March 1, 2000. At present, Maine's three major domestic electric utilities own the rights to more than 70% of the Wyman 4 facility output -- Central Maine Power (59.1457%), Bangor Hydro-Electric Company (8.3333%) and Maine Public Service Company (3.3455%).

Maine's public utility statutes employ a "facilities-based" definition of electric utility. Under Title 35-A M.R.S.A. § 102(6), an electric utility is defined to include any entity that owns, controls, operates or manages any electric plant for compensation within Maine. Electric plant, in turn, is defined to include all property used in connection with the production, generation, transmission, delivery or furnishing of electricity for public use. The petitioning utilities' interests in the Wyman 4 generating facility clearly meet this definition.

On the other hand, Title 35-A distinguishes between domestic electric utilities and foreign electric utilities. Under 35-A M.R.S.A. § 3131(3), an entity that is organized under the laws of another state or a province of Canada and that is authorized in that jurisdiction to generate, transmit or distribute electricity or otherwise operate as a utility qualifies as a "foreign electric utility." A foreign utility that also operates in Maine may qualify for an exemption from treatment as an electric utility in Maine if it meets the requirements of 35-A M.R.S.A. § 3140. Section 3140 creates an exemption from Maine utility regulation if a foreign electric utility limits its activities in the State to the ownership of a minority interest in any Maine utility facility in which domestic electric utilities possess a majority interest.<sup>2</sup> Historically, the petitioning electric

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<sup>2</sup>To qualify for the exemption, the foreign electric utility must also notify the Commission of its activities, file an annual report with the Commission, designate an office and agent in the State of Maine, and file with the Commission a certificate from the regulatory body in its home jurisdiction that that body oversees the foreign electric utility's issuance of stocks, bonds or other evidences of indebtedness or has general supervisory authority of the foreign electric utility's business.

utilities have been treated as foreign electric utilities and have not been subject to utility regulation by this Commission.

The historic method of electric utility operation in Maine is rapidly changing, however, due to the enactment of the electric industry restructuring act, P.L. 1997, ch. 316. As codified, 35-A M.R.S.A. § 3204 of the restructuring act requires Maine's domestic electric utilities to divest their interests in generation assets. The petitioning electric utilities note that once this process is complete,<sup>3</sup> domestic electric utilities will no longer own a majority interest in the Wyman 4 facility. As a result, the foreign electric utility owners of Wyman 4 will no longer qualify for the exemption from Maine utility regulation under Section 3140.

The petitioning electric utilities also question whether their interests in Wyman 4 would qualify as "excluded electric plant" under 35-A M.R.S.A. § 102(6-A). Adopted in the most recent legislative session (P.L. 1997, ch. 710), subsection 6-A carves out an exception from the broad definition of electric plant, thereby creating a coterminous exception from the definition of "electric utility" for owners of excluded electric plant. In pertinent part, it exempts from the definition of "electric plant" any generation assets, as defined in section 3201, subsection 18, to the extent those assets are used for the generation of electricity for sale for resale or for sale at retail to out-of-state customers.

The petitioning utilities have asked this Commission to determine whether their interests in the Wyman 4 facility would qualify as "excluded electric plant," thus excluding the owners of those interests from the definition of "electric utility" for purposes of Title 35-A. The petitioning utilities suggest that the issue would be clear if the entire output of the Wyman 4 facility were sold at wholesale or sold to retail customers located outside of the state. Their concern, however, is how the definitional exception will apply if some of the output is sold to retail customers in Maine while other portions (notably the generation from the interests held by the petitioning utilities) is sold at wholesale or to retail customers outside of Maine. The latter situation is particularly troubling if Central Maine Power divests its interest in the Wyman 4 facility before Bangor Hydro-Electric or Maine Public Service, since that divestiture will remove the foreign utility exemption for minority owners as discussed above.<sup>4</sup>

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<sup>3</sup>Since Central Maine Power owns a majority interest in the Wyman 4 facility, divestiture of that interest alone will trigger the loss of the foreign electric utility exemption.

<sup>4</sup>This problem only exists during the transition period to a

The petitioning utilities have suggested that the statute may be read to treat each individual utility owner's share of a generation plant as a separate "generation asset." Under such an approach, the domestic utility shares would not qualify for the "excluded electric plant" exception while the former foreign electric utilities' shares would qualify (since they are not sold at retail in the State) and thereby avoid regulation by this Commission as an electric utility.

We agree that the best interpretation of "excluded electric plant" permits the separate consideration of individual ownership interests in electric utility facilities. As noted by the petitioning utilities, this result comports best with the restructuring act's general intent to streamline and reduce regulation of competitive generation. See *Arsenault v. Crossman*, 696 A.2d 418, 421 (Me. 1996) (where statutory language is ambiguous, courts will examine the policy behind its enactment). Moreover, one of the primary purposes of the new definition of "excluded electric plant" was to avoid regulating as an electric utility the new owners of generation assets divested pursuant to 35-A M.R.S.A. § 3204. So long as the owners of these assets do not sell power at retail in Maine, they will not be regulated as an electric utility by the Commission. We can conceive of no reason why the Legislature would have intended to regulate a foreign utility that owns part of a facility where another part owner happens to sell its share of the power at retail in Maine but not regulate another foreign utility that wholly owns a generating facility, the entire output of which is sold at wholesale or at retail outside of Maine. The Legislature's primary intention was to ensure that this Commission continues to regulate any entity that sells power at retail in Maine, and that we not regulate an entity that does not do so, even if it happens to own generating assets within the State.

In this regard, it is instructive to note that Section 102(6-A) explicitly references the definition (Section 3201, subsection 10) and use of the term "generation assets" in the electric industry restructuring act. The primary use of the term "generation assets" in the restructuring act is in the divestiture section cited above, Section 3204. The clear purpose of that section is to require an electric utility to divest any ownership interest that it possesses in a generation facility, regardless of whether the utility owns 100% of the facility or

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fully competitive retail generation market on March 1, 2000. At that time, any generation asset (other than generation assets held by transmission and distribution utilities as permitted under Section 3204) will be excluded from the definition of electric plant.

only a partial interest.<sup>5</sup> This strongly implies that the same interpretation be applied in the context of "excluded electric plant" and that we interpret the use of "generation assets" to permit each separate ownership interest to be treated as a separate generation asset for purposes of applying the "excluded electric plant" definition.

For the reasons described above, we find that when determining whether the "excluded electric plant" exemption applies, we will separately evaluate each utility's interest in the Wyman 4 facility (and any other generation facility with multiple owners). If the interest meets the definition of excluded electric plant, ownership of that interest will not trigger Maine regulation as an electric utility, regardless of whether other partial owners of the Wyman 4 facility sell their shares of the output at retail in Maine. If the interest fails to qualify for the exception, the owner will be treated as an electric utility for purposes of Title 35-A.

Dated at Augusta, Maine this 2nd day of December, 1998.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Nugent  
   Diamond

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<sup>5</sup>Section 3204 does provide certain limited exceptions from the divestiture requirement that are not relevant to the present discussion.